

Appl. No. 10/678,206  
Docket No. 9049  
Amdt. dated February 9, 2009  
Reply to Office Action mailed on December 10, 2008  
Customer No. 27752

## REMARKS

### Claim Status

Claims 17 and 29 have been cancelled without prejudice. Claims 1-16 were previously cancelled. Claims 18, 20, 23, 25, and 26 have been amended to depend from claim 27 (as opposed to cancelled claim 17).

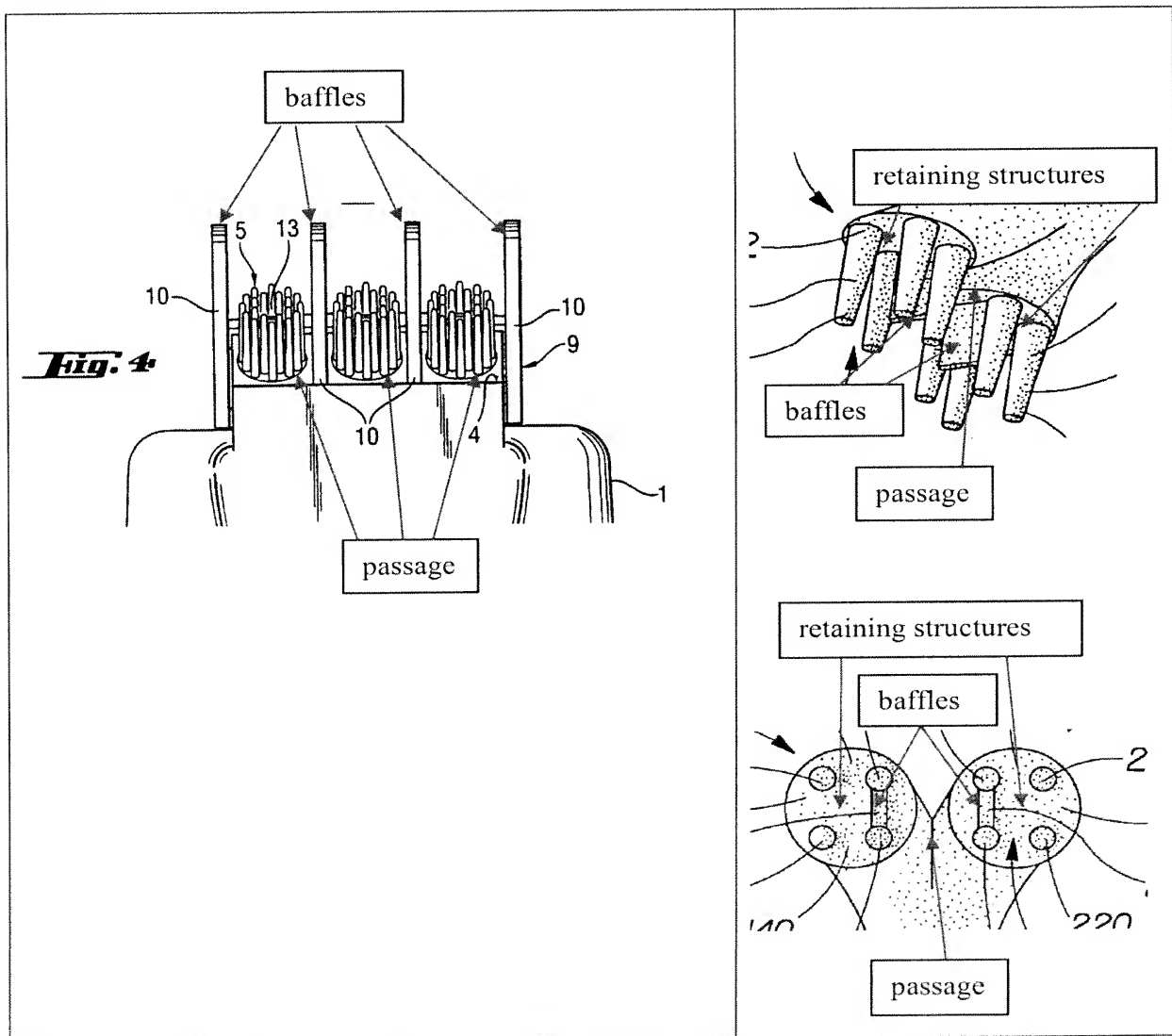
It is believed these changes do not involve any introduction of new matter. Consequently, entry of these changes is believed to be in order and is respectfully requested.

### Rejections Under 35 USC 102(b) Over WO 00/69308

Claims 17-19 and 27 are rejected under 35 U.S.C. 102(b) as being anticipated by WO 00/69308 (hereinafter the '308 application). Claim 17 has been cancelled, thereby rendering the rejection of claim 17 moot. With regard to claim 27, the Office asserts that the '308 application discloses a hair treatment applicator (figs. 3 and 4) comprising a handle (the container to which the cap 1 screw into), a head (1) connected to the handle, the head comprising a first retaining structure (at 5, fig. 4) including a first base (14, fig. 8), a first plurality of tines (5) extending from the base, a first baffle (10, fig. 4) extending from the base which together form a first retaining volume, a second retaining structure (at 5) including a second base (14, fig. 8), a second plurality of tines (5) extending from the second base, a second baffle (10, fig. 4) extending from the second base which together form a second retaining volume; a passage (figs. 3, 4) between first and second baffles, wherein the passage is free of hair treatment prior to first use; a hair treatment (translated abstract) contained in the first and second retaining structures. Applicant respectfully traverses the present rejection based on the following comments.

First, the Office's interpretation of the '308 application is both nonsensical and impossible. By definition, prior to first use, hair treatment cannot be contained in the first and second retaining structures of the '308 applicator. Analogously, once hair treatment is dispensed through the outlet openings of the '308 applicator, hair treatment will necessarily be contained in all three chambers of the applicator: the first retaining structure, the second

retaining structure, and the passage (4) between the baffles/guide prongs. The outlet openings of the product guides are disposed between the prongs ("each product guide is arranged between two mutually opposite guide prongs", '314 patent, col. 2, lines 50-51). Hair colorant is dispensed through the outlet openings. The passage(s) (4), therefore, cannot be substantially free of hair treatment, as hair treatment is dispensed into the passage(s) (see below).



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The '314 patent teaches that the "prongs narrow the outlet regions of the hair colorant" ('314 patent, col. 2, lines 38-41). The passage(s) will thus, by definition, contain the hair colorant. If the passage(s) were free of hair colorant, this would indicate that the applicator device was not functioning properly to dispense hair colorant (e.g., outlets clogged).

Thus, the '308 application does not teach each and every element of claim 27, as well as claims 18-26 and 28, which depend directly or indirectly from claim 27. Thus, claims 18-28 are novel over the '308 application.

#### Rejections Under 35 USC 103(a) Over WO 00/69308

Claims 20-26, 28, and 29 are rejected under 35 U.S.C. 103(a) as being unpatentable over WO 00/69308. Claim 29 has been cancelled without prejudice, thereby rendering this rejection moot. With regard to claims 20-26, the Office states that the '308 application discloses the essential claimed invention *except* for the handle being integrally molded with the retaining structures, the applicator being molded as single piece and being made of polyethylene; the '308 application also fails to show the shape of the tines being frusto-conical, each tine with a proximal end diameter being .125 to .3125 inches and a distal end diameter of .0625 to .375 inches, a height of each tine being .25 inches to 1 inches and the passage width being at least .25 inches. The Office asserts, however, that it would have been obvious to one having an ordinary skill in the art at the time the invention was made to form the handle and the applicator as a single piece, since it has been held that forming in one piece an article which has formerly been formed in two pieces and put together involves only routine skill in the art. The Office further asserts that it would have been obvious to one having an ordinary skill in the art at the time the invention was made to employ the applicator being made of polyethylene, since it has been held to be within the general skill of a worker in the art to select a known material on the basis of its suitability for the intended use as a matter of obvious design choice, citing In re Leshin, 125 USPQ 416. And, according to the Office, it would have been obvious to one having an ordinary skill in the art at the time the invention was made to construct each tine with a proximal end diameter being

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.125 to .3125 inches and a distal end diameter of .0625 to .375 inches, a height of each tine being .25 inches to 1 inches and the passage width being at least .25 inches, since such a modification would have involved a mere change in the size of the known component (A change in size is generally recognized as being within the level or ordinary skill in the art. In re Rose, 105 USPQ 237 (CCPA 1955)).

Finally, with regard to claim 28, the Office acknowledges that the '308 application fails to show the arrangement of the tines in the first and second rows as claimed in claim 28. The Office asserts, however, that it would have been obvious to one having ordinary skill in the art at the time the invention was made to construct the tines in the particular arrangement claimed in claim 28, since such modifications would involve mere change in the arrangement design of the known component. Applicants respectfully traverse the present rejections based on the following comments. Specifically, the '308 application does not teach or suggest each and every element of Applicants' claimed hair treatment applicator and, thus, does not establish a prima facie case of obviousness.

Each of claims 20-26 and 28 requires a passage extending between the first and second baffles, the passage being substantially free of hair treatment and configured to receive a strand of hair without exposing the strand of hair to hair treatment contained in the first and second retaining structures. As detailed above, the guiding prongs of the '308 device do not bound a passage that is configured to receive a strand of hair without exposing the strand of hair to hair treatment. On the contrary, the guiding prongs of the '308 application bound and contain a volume of hair treatment, released through outlets located between the prongs. The passage(s) (4) of the '308 application cannot be substantially free of hair treatment, as hair treatment is dispensed into the passage(s) (see above). If the passage(s) were free of hair colorant during use, this would indicate that the outlets of the applicator device were clogged.

As it fails to teach or suggest each and every element of claims 20-26 and 28, the '308 application does not establish a prima facie case of obviousness. Consequently, Applicants' claims 20-26 and 28 are patentable over the '308 application.

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Conclusion

This response represents an earnest effort to place the present application in proper form and to distinguish the invention as claimed from the applied reference(s). In view of the foregoing, entry of the new claims presented herein, reconsideration of this application, and allowance of the pending claim(s) are respectfully requested.

Respectfully submitted,

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Signature

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